

# HOUSE BILL REPORT

## HB 1860

---

**As Reported by House Committee On:**  
Judiciary

**Title:** An act relating to expert witnesses in actions under chapter 7.70 RCW.

**Brief Description:** Limiting the use of expert witnesses.

**Sponsors:** Representatives Lantz, Flannigan, Cody, Kirby, Morrell, Springer, Williams, Miloscia, Upthegrove, Linville, O'Brien, Wood and Kagi.

**Brief History:**

**Committee Activity:**

Judiciary: 2/14/05, 2/28/05 [DPS].

### Brief Summary of Substitute Bill

- Limits the number of expert witnesses in a medical malpractice action to two per party on each issue, unless there is good cause for additional experts.
- Requires pretrial expert reports and prohibits expert depositions in medical malpractice actions.
- Requires a plaintiff to file a certificate of merit when commencing a medical malpractice action.

---

## HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Lantz, Chair; Williams, Vice Chair; Campbell, Kirby, Springer and Wood.

**Minority Report:** Without recommendation. Signed by 3 members: Representatives Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; and Serben.

**Staff:** Edie Adams (786-7180).

### Background:

Medical malpractice actions are civil tort actions for the recovery of damages for injury or death resulting from the provision of health care. There are three grounds on which a health care provider may be found liable in a medical malpractice action:

- the health care provider failed to follow the required standard of care;
- the health care provider promised that the injury suffered would not occur; or
- the injury resulted from health care to which the patient did not consent.

Failure to follow the standard of care means that the health care provider failed to exercise the degree of care expected of a reasonably prudent provider in the same field at that time, and acting in the same or similar circumstances.

In a medical malpractice action, the plaintiff has the burden of proof to establish all necessary elements. Expert witnesses are generally required in a medical malpractice action to establish the standard of care of a reasonably prudent health care provider and to prove that the failure to exercise that standard of care was the proximate cause of the patient's injury. Under court rules, a person can qualify as an expert witness based on knowledge, skill, experience, training, or education. The trial judge can reject a witness that does not qualify as an expert and has some discretion to limit the number of expert witnesses in a case.

Prior to trial, each party is entitled to what is known as "discovery" of facts and information from the other party that may be relevant to the case. Discovery serves the purposes of preserving testimony for trial, eliminating undisputed factual matters, and ascertaining relevant facts and information. Discovery is conducted through depositions, interrogatories, requests for admissions, and requests for the production of documents. Under court rule, a party is generally entitled to discovery regarding any matter that is not privileged and that is relevant to the subject matter of the suit.

A specific court rule deals with discovery of expert witnesses. A party may use interrogatories to require another party to disclose the identity of potential expert witnesses, the subject matter on which the expert intends to testify, the substance of the facts and opinions the expert plans to testify about, and a summary of the grounds for the expert's opinions. In addition, a party may depose any expert that another party intends to call as an expert witness at trial.

---

### **Summary of Substitute Bill:**

Number of Expert Witnesses: The number of expert witnesses allowed per party in a medical malpractice action is limited to two per issue, except upon a showing of good cause.

Pretrial Expert Report: All parties to a medical malpractice action must file a pretrial expert report that discloses the identity of all expert witnesses and states the nature of the testimony the experts will present at trial. Further depositions of the experts are prohibited. The testimony presented by an expert at trial is limited in nature to the opinions presented in the pretrial report.

Certificate of Merit: In medical malpractice actions involving a claim of a breach of the standard of care, the plaintiff must file a certificate of merit at the time of commencing the

action. If the action is filed within 45 days of the running of the statute of limitations, the plaintiff has 45 days from filing the action to submit the certificate of merit.

The certificate of merit must state that, based on the information known at the time, there is a reasonable probability that the defendant's conduct did not meet the required standard of care. The certificate of merit must be executed by a health care provider who meets expert witness qualifications established in the chapter governing health care actions. The court may grant up to a 90-day extension of time for filing the certificate if the court finds there is good cause to grant the extension.

Failure to file a certificate of merit that complies with these requirements results in dismissal of the case. If a case is dismissed for failure to comply with the certificate of merit requirements, the filing of the claim may not be used against the health care provider in liability insurance rate setting, personal credit history, or professional licensing or credentialing.

**Substitute Bill Compared to Original Bill:**

The original bill allowed only two experts per *side* (rather than per party) on each issue.

---

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Testimony For:** The fundamental focus of these bills is protecting access and improving affordability of health care. We've worked for years on compromises, and it is time to work together to move forward and get the job done. The costs of expert testimony and depositions is significant. The limit on the number of experts is a nicely crafted balancing act that will spread savings across the system. The potential impact on settlements of limiting depositions could be offset by new motivation to settle cases.

(With concerns) We support the concept of the certificate of merit provision but the timing is a problem. There is no pre-suit discovery, but the certificate must be filed when the suit is filed. The certificate will have more value if it is filed after discovery when better opinions can be formed.

**Testimony Against:** We have concerns about limiting the number of experts to two. We will have to go to court to show the need for more experts, and this will increase costs. This provision is like a provision in Initiative 336. Is it an alternative? The provision that prohibits deposition of experts will have an adverse impact on settlement of cases. Cases settle because experts get damaged in their depositions. That is what discovery is all about.

**Persons Testifying:** (In support) Representative Lantz, prime sponsor.

(With concerns) Larry Shannon, Washington State Trial Lawyers' Association.

(Opposed) Mark Johnson, Washington State Bar Association; Barbara Shickich, Washington State Hospital Association; and Cliff Webster, Washington State Medical Association.

**Persons Signed In To Testify But Not Testifying:** None.